STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTEZ LEONDRE COOPER,

Defendant-Appellant.

UNPUBLISHED
April 12, 2005

No. 251355
Genesee Circuit Court
LC No. 03-011469-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN OLANDUS BURNETT,

Defendant-Appellant.

No. 251356
Genesee Circuit Court
LC No. 03-011516-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN OLANDUS BURNETT,

Defendant-Appellant.

No. 251357
Genesee Circuit Court
LC No. 03-011468-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTEZ LEONDRE COOPER,

No. 251717
Genesee Circuit Court
LC No. 03-011521-FC

Defendant-Appellant.

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant Cooper appeals as of right his jury convictions of (1) second-degree murder, MCL 750.317, (2) felony murder (kidnapping), MCL 750.316(b), (3) conspiracy to commit first-degree premeditated murder, MCL 750.157a, (4) assault with intent to do great bodily harm less than murder, MCL 750.84, (5) felon in possession, MCL 750.224f, and (6) felony firearm, MCL 750.227b. His murder-related convictions arose from the kidnapping, torture, and murder of Johnnie Ray McFadden in Flint, while the gun convictions arose from the murder of Lashell Childs and assault of Lakisha Johnson in Burton. We affirm, but vacate the second-degree murder conviction and remand for amendment of the judgment of conviction and sentence.

Defendant Burnett appeals as of right his jury convictions, related to the murder of McFadden in Flint, of (1) first-degree premeditated murder, MCL 750.316(a), (2) felony murder (CSC I/kidnapping), MCL 750.316(b), (3) conspiracy to commit first-degree premeditated murder, MCL 750.157a, (4) first-degree criminal sexual conduct, MCL 750.520b, (5) kidnapping, MCL 750.349, (6) felon in possession, MCL 750.224f, (7) felony firearm, MCL 750.227b, and (8) interfering with a criminal case (witness threats/intimidation), MCL 750.122(7)(b). He also appeals as of right his jury convictions, related to the murder of Childs and assault of Johnson in Burton, of (1) second-degree murder, MCL 750.317, (2) assault with intent to murder, MCL 750.83, (3) felon in possession, MCL 750.224f, and (4) felony firearm, MCL 750.227b. We affirm.

On appeal, defendant Cooper argues that the trial court abused its discretion when it joined the Flint and Burton cases for a joint trial with defendant Burnett. Defendant Burnett argues that the Flint and Burton cases should not have been consolidated. We disagree with both arguments. Whether two defendants should receive a joint trial is reviewed for an abuse of discretion. MCL 768.5; *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). The interpretation of a court rule is reviewed de novo. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003).

MCR 6.120 permits the consolidation of two or more informations for a single trial if the offenses are related, i.e., (1) if they are based on "the same conduct," or (2) if they are based "on a series of connected acts or acts constituting part of a single scheme or plan." See *People v Tobey*, 401 Mich 141, 151-153; 257 NW2d 537 (1977). Here, both defendants committed the Flint and Burton offenses as part of a single scheme or plan. They both participated in the torture, rape, kidnapping, and murder of McFadden in Flint and, to avoid capture and dispose of evidence, they fled to Burton armed with guns. There Burnett encountered Johnson and Childs and, using the same gun used to kill McFadden, he shot and killed Childs and shot and wounded Johnson, continuing his killing spree. As the trial court noted, much of the same witness testimony and evidence would be admissible in both the Flint and Burton cases, thus consolidation of these related cases for a single trial did not constitute an abuse of discretion.

With regard to defendant Cooper's claim that he should not have had a joint trial with defendant Burnett, this argument too is without merit. Under MCR 6.121(A) the trial court may order a joint trial with regard to two defendants charged with related offenses. The offenses are related as discussed above. However, defendant Cooper claims that because defendant Burnett was charged with murder in the Burton case and he was not, he should have had a separate trial. But, when two defendants are tried on similar charges and then one of those defendants is also charged for a separate offense, a separate trial is only mandated if the separate offense arises out of a totally unrelated transaction that was not associated with the common charges. See *People v Missouri*, 100 Mich App 310, 349; 299 NW2d 346 (1980). "[J]oinder of distinct criminal charges is permitted against two defendants where (1) there is a significant overlapping of issues and evidence, (2) the charges constitute a series of events, and (3) there is a substantial interconnectedness between the parties defendant, the trial proofs, and the factual and legal bases of the crimes charged." *Id*. Here, as already discussed, there was significant overlapping of issues and evidence, the charges constitute a series of events, and there is substantial interconnectedness between the parties and cases; therefore, joinder did not constitute an abuse of discretion.

Next, defendant Cooper argues that his motion for directed verdict on the felony murder charge should have been granted since he did not participate in the kidnapping and killing of McFadden. Considering the evidence in a light most favorable to the prosecution, we disagree. See *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Defendant Cooper claims that he could not be found guilty of felony murder because McFadden was not murdered in the perpetration of a kidnapping since he was not killed while locked in the closet or at the house on Alma Street. See MCL 750.316; MCL 750.349. This argument is without merit. It is clear from the record evidence that McFadden, who was unarmed, beaten, raped, and tortured, was not free to leave the house on Alma and had no choice but to follow the directions of both defendants Cooper and Burnett, who were armed with guns, when they forced him to get in a vehicle and leave the house on Alma where he was killed in another location. That McFadden was moved from the house to another location for the murder does not give rise to two different kidnapping offenses and defendant Cooper has failed to cite any supporting legal authority for this position. McFadden was kidnapped by defendants Cooper and Burnett and, during the course of the kidnapping, he was murdered.

Defendant Cooper next argues that his motion for directed verdict on the first-degree premeditated murder charge should have been granted because he was not present when McFadden was actually murdered. Considering the evidence in a light most favorable to the prosecution, we disagree. See *Riley*, *supra*.

Defendant Cooper was charged with aiding and abetting in the first-degree premeditated murder of McFadden. To establish first-degree premeditated murder, the killing must have been intentional, premeditated, and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). To establish that defendant Cooper aided and abetted in the murder, the evidence must prove that he performed acts or gave encouragement that assisted in the premeditated killing with the intent to kill or gave aid knowing that the principal possessed the intent to kill. See *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999); *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999).

Here, the evidence of record included that defendant Cooper was the primary abuser and terrorized McFadden for hours, before defendant Burnett led McFadden out of the house at gunpoint and into the backseat of a car. Defendant Cooper had numerous private discussions with defendant Burnett before, during, and after different stages of the crime, e.g., when McFadden arrived at the house before the beating began, during the course of the beating, before McFadden was led out of the house at gunpoint, and after defendant Burnett returned from the murder scene, leading to an inference that he knew and agreed with the plan to kill McFadden. Further, when Burnett returned from the murder scene without one of the other participants, defendant began to look out the window with a worried expression and when the other participant finally returned, defendant Cooper looked very happy and had a "Kool-Aid" smile on his face. Defendant Cooper also helped to clean up the evidence from the house and made plans with defendant Burnett to get a motel room in Burton, to avoid capture for the murder. In sum, the evidence permitted the jury to conclude that defendant Cooper aided and abetted in the first-degree premeditated murder of McFadden; thus, the motion was properly denied. We note defendant Cooper's argument in his Standard 4 Brief, that the evidence did not establish that he aided and abetted in McFadden's murder, and conclude that it is likewise without merit.

Defendant Cooper next argues that his motion for directed verdict on the conspiracy to commit first-degree murder charge should have been granted because there was no evidence that he was part of an agreement to kill McFadden. Considering the evidence in a light most favorable to the prosecution, we disagree. See *Riley*, *supra*.

Criminal conspiracy is a specific intent crime arising from a mutual agreement between two or more parties to do or accomplish a crime or unlawful act. *People v Hammond*, 187 Mich App 105, 108; 466 NW2d 335 (1991), quoting *People v Gilbert*, 183 Mich App 741, 749-750; 455 NW2d 731 (1990). "[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties because they lead to inferences about the coconspirators' intentions. *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Here, there was ample evidence from which the jury could infer that defendant Cooper was part of a conspiracy with at least defendant Burnett to intentionally, and with premeditation and deliberation, kill McFadden. As previously discussed, defendant Cooper had numerous private discussions with defendant Burnett before, during, and after different stages of the crime, e.g., when McFadden arrived at the house before the beating began, during the course of the beating, before McFadden was led out of the house at gunpoint, and after defendant Burnett returned from the murder scene, which leads to an inference that he and Burnett agreed to, and intended to, kill McFadden. Defendant Cooper's actions after the murder was completed, including cleaning up of the house to get rid of evidence and making arrangements to stay at a motel to avoid capture, are additional considerations. The trial court properly denied the motion.

Next, defendant Cooper argues that he was denied the effective assistance of counsel because his attorney stipulated to the admission of a judgment of conviction for a prior felonious assault as related to the charge of felon in possession. However, even if we concluded that the stipulation was in error, it is not reasonably probable that, but for counsel's error, the result of the proceedings would have been different in light of the overwhelming evidence of defendant's guilt and the prosecution's duty to prove that defendant was indeed a felon in possession. See

People v Anderson, 209 Mich App 527, 537; 531 NW2d 780 (1995). Therefore, this issue is without merit.

Defendant Cooper next argues that the trial court abused its discretion when it admitted evidence of firearms found at the time of his arrest. A trial court's decision on an evidentiary issue is reviewed for an abuse of discretion and any such error will not merit reversal unless it involves a substantial right and, on review of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant argues that the firearms found at the time of his arrest three days after the crimes were committed constituted irrelevant evidence. He was charged with felony firearm and felon in possession. See *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Here, the record evidence indicated that defendant Cooper was seen possessing a weapon, including a nine-millimeter, during the assault on McFadden. That a nine-millimeter was recovered from the house in which he was living, and in the bedroom in which he was staying, at the time of his arrest tends to support this testimony. Further, that it was hidden under a mattress, leads to an inference that it was the one used in committing the crimes against McFadden; therefore, the evidence was relevant. "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *People v Houston*, 261 Mich App 463, 467; 683 NW2d 192 (2004), quoting *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). There was also testimony by another participant in the crimes that there was an assault rifle at the Alma house at the time McFadden was assaulted and the assault rifle that was found in defendant Cooper's house tends to corroborate that testimony as well. Further, the evidence was not unfairly prejudicial merely because it was damaging. But, even if the evidence was improperly admitted, such error was harmless in light of the overwhelming evidence of defendant's guilt. See *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Finally, defendant Cooper argues that sentences for both felony murder and second-degree murder for the death of McFadden was a violation of double jeopardy protections. The prosecution concedes, and we agree. Principles of double jeopardy prohibit multiple murder convictions for the death of a single victim. See US Const, Am V; Const 1963, art 1, § 15; *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000). Therefore, defendant cannot be convicted of both felony murder and second-degree murder with regard to McFadden's death. The judgment of conviction and sentence must be modified so as to vacate his second-degree murder conviction, leaving only his felony murder conviction. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). We remand the matter to the trial court for this amendment.

Defendant Burnett argues that Lakisha Johnson's in-court identification testimony was tainted because she was only shown a photographic lineup although he was in custody and entitled to a corporeal lineup. We disagree. A trial court's decision to admit identification evidence will not be reversed unless the decision was clearly erroneous. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

When an accused is in custody identification by photograph should not be used unless justified by the circumstances. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled on other grounds *People v Hickman*, 470 Mich 602, 603; 684 NW2d 267 (2004). Some examples of such circumstances include, but are not limited to, that (1) it is not possible to arrange a proper lineup, (2) insufficient number of comparable individuals available, (3) immediate identification is necessary, (4) the witnesses are too far away, and (5) the accused refuses to participate. *Anderson*, *supra* at 186 n 22.

In this case, the photographic lineup was conducted with Johnson three days after defendant Burnett was taken into custody. The reason that it was three days later is because, as Detective Moffit testified, Johnson was in the hospital recovering from surgery related to the bullet wounds she suffered about three days before and was incoherent and on significant narcotics for pain. Johnson was unable to leave the hospital to attend a corporeal lineup, she was the lone surviving eyewitness to the shooting that occurred at the Super 8 Motel, and she suffered extensive and critical wounds that required a two and one-half month hospitalization—legitimate reasons supporting the use of a photographic lineup. Further, defendant admits that his counsel was present during the photographic lineup to ensure that the lineup was fairly conducted and, thus, reliable. Because the photographic lineup was not erroneous, it was not necessary to establish an independent basis for the identification; therefore, this argument is without merit as well. See *People v Kachar*, 400 Mich 78, 91; 252 NW2d 807 (1977).

Next, defendant Burnett claims that the trial court erred when it admitted testimony from a police officer about a statement made by co-defendant Cooper. However, defendant Burnett's jury was removed from the courtroom during this disputed testimony, thus, the issue is moot, i.e., it presents only an abstract question of law that does not rest on existing facts or rights since defendant Burnett's jury did not hear any of the disputed testimony. See, e.g., *East Grand Rapids School Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 390; 330 NW2d 7 (1982).

Defendant Burnett next argues that the trial court erred when it permitted Detective Sergeant Mark Hosmer to testify that the written statements of Gregory Calhoun, another participant in these crimes, were consistent with his trial testimony, i.e., "evidence of a prior consistent statement." We disagree.

During cross examination, defense counsel asked Detective Sergeant Hosmer several questions about whether the three statements made by Calhoun occurred before or after any negotiations for a plea agreement and the Detective Sergeant answered that he did not know. On re-direct, the prosecutor tried to determine more specifically when each statement was made in relation to Calhoun's arrest, obviously in an attempt to dispel the inference that the statements were pressured or the result of a plea agreement. The prosecutor elicited that the first statement by Calhoun was made even before Calhoun was charged with any crimes, was twenty-nine pages long, and contained crucial information relied upon for the investigation into these crimes. The prosecutor then tried to elicit more specific information regarding the contents of the statement but a hearsay objection was sustained so the prosecutor asked if the information given was consistent with Calhoun's trial testimony and the Detective Sergeant answered in the affirmative. No specific quotes or other information contained in Calhoun's statements was provided during this witness testimony. This sole reference to the consistency of the statement with trial testimony does not constitute "evidence of a prior consistent statement" that warrants relief.

Defendant Burnett next argues that the prosecutor improperly had his witness, Detective Sergeant Hosmer, vouch for the testimony of Calhoun. We disagree. Because defendant failed to preserve this prosecutorial misconduct claim, our review is for plain error affecting his substantial rights. See *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, during the prosecutor's direct examination of Detective Sergeant Hosmer, he questioned Hosmer about an incident in which Hosmer took Calhoun to the site of the shooting by asking, "What happened?" Detective Sergeant Hosmer proceeded to testify that Calhoun pointed out where they had parked their car, and where defendant Burnett was standing when he fired three shots at McFadden in the direction of a house located at 1105 Hamilton. He further testified that a bullet hole was found in the south wall of the house on 1105 Hamilton. The prosecutor then asked "where that hole was in comparison to where Greg Calhoun said that Shawn Burnett was at when firing?" Detective Sergeant Hosmer replied that "it appeared to qualify [sic] with what Gregory had told me, where Shawn was standing in the backyard." The prosecutor then asked Hosmer about a bullet hole and slug found in a van in the backyard of 1101 Hamilton and then asked, "Where was that in comparison to where Greg Calhoun was saying Shawn Burnett was when he fired the gun?" Hosmer replied, "That basically corroborated his story also, that the angles were the same." Defense counsel did not object in either instance.

It appears that defendant Burnett is claiming that the prosecutor's "comparison" questions to Hosmer constituted improper vouching of Calhoun's credibility by the prosecutor through his witness. However, the questions were not inappropriate and did not amount to asking Hosmer to comment on Calhoun's credibility. See *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The prosecutor simply asked questions about the evidence, including the type and strength of the evidence, that the police relied upon in investigating these crimes and the prosecutor is permitted to attempt to ascertain which facts are in dispute. See *People v Dennis*, 464 Mich 567, 575; 628 NW2d 502 (2001); *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). In any event, in light of the overwhelming evidence against defendant, such testimony did not affect defendant's substantial rights because the questioning did not result in the conviction of an actually innocent defendant, or seriously affect the fairness of the proceedings. See *Carines*, *supra* at 763, 774.

Finally, defendant Burnett claims that the prosecutor improperly elicited from Detective Sergeant Hosmer that defendant had exercised his right to remain silent by failing to "cooperate" in allowing a search of his house. We disagree. Because defendant failed to preserve this prosecutorial misconduct claim, our review is for plain error affecting his substantial rights. See *McLaughlin*, *supra*.

Use of a criminal defendant's post-arrest silence, after receiving Miranda warnings, for impeachment purposes violates a defendant's constitutional right to due process under the Fourteenth Amendment. See *Dennis*, *supra* at 573, citing *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). During the prosecutor's direct examination of Detective Sergeant Hosmer, Hosmer testified that after defendant Burnett was arrested in a vacant house, he proceeded to the Burton police department to interview another participant in these crimes, Royal Kamien, and defendant Burnett. The following exchange then took place:

Q. Did you get anything in the interview with Royal Kamien that was helpful at that point in time?

A. We received enough information that I gave to the prosecutor's office which allowed us to get a search warrant for 422 W. Alma.

Q. Did Shawn Burnett give you any information that was helpful for that?

A. No, he did not.

Reasonably interpreted, the testimony merely indicated that defendant Burnett, whether he gave information or not, did not give any information that was helpful in obtaining a search warrant. It is unclear from this one reference whether defendant Burnett exercised his right to remain silent or whether he provided any information to police, helpful or otherwise. Further, defendant did not testify so the testimony could not possibly have been used against defendant for impeachment purposes. See *Dennis*, *supra* at 578. Accordingly, the prosecutor did not impermissibly use defendant's post-arrest silence against him in this case on the basis of that one question. Further, even if the question was improper, it did not constitute plain error affecting his substantial rights, i.e., it was not outcome-determinative. See *People v McNally*, 470 Mich 1, 7; 679 NW2d 301 (2004).

All convictions against both defendants are affirmed with the exception that defendant Cooper's second-degree murder conviction is vacated. The matter is remanded to the trial court for amendment of the judgment of conviction and sentence accordingly. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello